

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DARIN L. MUEHLER, ET AL., :
4 Petitioners :
5 v. : No. 03-1423
6 IRIS MENA. :
7 - - - - -X
8 Washington, D.C.
9 Wednesday, December 8, 2004
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:08 a.m.
13 APPEARANCES:
14 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
15 the Petitioners.
16 KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioners.
20 PAUL L. HOFFMAN, ESQ., Venice, California; on behalf of
21 the Respondent.
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P R O C E E D I N G S

(11:08 a.m.)

JUSTICE STEVENS: We'll now hear argument in the case of Muehler against Mena.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Justice Stevens, and may it please the Court:

At issue in this case is the safety of police officers when they attempt to execute a search warrant in an inherently unsafe situation.

JUSTICE O'CONNOR: May I ask one preliminary question, Mr. Phillips? Do we have before us here any question at all about qualified immunity?

MR. PHILLIPS: Well, we do believe that a qualified immunity issue is bound up with the underlying merits. It was addressed that way by the Ninth Circuit because --

JUSTICE O'CONNOR: But it wasn't -- it wasn't in the questions --

MR. PHILLIPS: This Court --

JUSTICE O'CONNOR: -- on which we granted cert?

MR. PHILLIPS: This Court in Procunier treated the qualified immunity issue as part and parcel of the

1 underlying merits of the case and -- and, in fact, skipped
2 over the question of what 1983 meant in order to address
3 the qualified immunity issue. And presumably --

4 JUSTICE BREYER: How -- how --

5 MR. PHILLIPS: -- the Court could do the same
6 thing here.

7 JUSTICE BREYER: How do we do it? It goes right
8 to the heart of this from you, the qualified immunity
9 thing, for the reason that if you look at the facts and
10 circumstances, it sounds to me like a somewhat close
11 question as to whether the police did or did not exceed
12 the reasonable bounds -- reasonable bounds.

13 Now, if it's a close question, you have a jury
14 verdict against you, and -- and then I think, well, yes,
15 but I begin to come -- become disturbed if I think of
16 qualified immunity. I mean, it isn't that clear. So --
17 so having read through the thing, I -- I preliminarily
18 start by thinking, well, it could have been excessive
19 force, I mean, given -- you know, I'm using that in
20 quotes.

21 MR. PHILLIPS: Right.

22 JUSTICE BREYER: The jury said it was. Who am I
23 to say it wasn't --

24 MR. PHILLIPS: Well, I mean, this -- this --

25 JUSTICE BREYER: -- in that situation? But

1 qualified immunity. So now, what do I do?

2 MR. PHILLIPS: Well, in the first instance, it's
3 reasonably clear to me that you're not bound by the jury's
4 determination here. This Court has already --

5 JUSTICE O'CONNOR: We -- don't we have to give
6 any weight at all to the jury finding there or --

7 MR. PHILLIPS: With respect to the historical
8 facts of the case, who did what to whom, of course, you
9 have -- that -- that's subject to clearly erroneous
10 review. On the issue of whether or not the conduct at
11 issue here is reasonable, that's an issue of law or at
12 least a mixed issue of fact --

13 JUSTICE BREYER: Well, a lot of it may depend on
14 the --

15 MR. PHILLIPS: -- and law that this Court has
16 decided as de novo.

17 JUSTICE BREYER: -- on the music as to
18 handcuffing and what did they say and what was the
19 atmosphere and what was the garage really like and how
20 risky was it that there be gang members in the outhouses
21 and -- and all kinds of stuff that you might sense from
22 the testimony.

23 MR. PHILLIPS: It -- it seems to me that --
24 Justice Breyer, that the answer to all of those questions
25 go to the core of what it means to exercise unquestioned

1 command of the situation, which is a pure legal standard
2 that this Court adopted a quarter of a century ago in
3 Michigan v. Summers. And that's a question of law.

4 To be sure, there are lots of elements of it,
5 but what my position would be -- and obviously the
6 officers' position in this case -- is that in exercising
7 unquestioned command, you can accept all of the facts as
8 you've just described them and none of that is excessive
9 because it doesn't expose anyone to anything other than
10 what is necessary in order to achieve complete control
11 under the circumstances in order to ensure the protection
12 of the individual officers and -- and candidly of the
13 other individuals who were being -- being detained, all
14 four of them, under these circumstances.

15 JUSTICE O'CONNOR: Have you responded to my
16 initial question? Have you said all you want to say about
17 qualified immunity?

18 MR. PHILLIPS: No, Justice O'Connor. My -- my
19 basic answer to that is that this Court already addressed
20 that issue in Procunier. It considered that the qualified
21 immunity issue was part and parcel of the issue, even
22 though it hadn't been presented in the question presented,
23 and indeed, I think in this case it's actually a -- a
24 stronger argument that qualified immunity is in this case
25 because that is the way that the Ninth Circuit

1 specifically addressed the issue. It looked at under
2 Saucier. It evaluated whether or not qualified immunity
3 was appropriate and -- and did the two-part test, the
4 first part being whether it was a constitutional violation
5 and the second part whether or not it was reasonable under
6 these particular circumstances.

7 So if I -- if I cannot persuade you that this is
8 constitutional, which obviously I -- I hope I can do, it
9 seems to me absolutely unquestioned that there -- that
10 what the officers did here under these circumstances were
11 perfectly reasonable.

12 JUSTICE GINSBURG: Well, what is the -- what is
13 the function of a jury in this case? What does the jury
14 verdict stand for? And the jury doesn't return a special
15 verdict and says we find X, Y, and Z. It finds whether
16 the police exercised excessive force, and that's all we
17 know from the jury verdict.

18 Other -- I think what you're saying is that
19 these cases should go off on summary judgment or even a
20 demurrer. You assume all the facts as the plaintiff
21 alleges them and then the Court decides whether that adds
22 up to unreasonable within the meaning of the Fourth
23 Amendment.

24 MR. PHILLIPS: I -- I'm not saying that that
25 would be true in all cases. I do think in this particular

1 case you did not need to have a jury verdict. We would
2 have been prepared to stipulate to the facts as they were
3 found ultimately and -- and giving the benefit of all of
4 the inferences to the --

5 JUSTICE GINSBURG: Well, we don't know the fact
6 -- what facts were found because all we have is in the
7 jury verdict that this was excessive force. Period.
8 That's all.

9 MR. PHILLIPS: But that's just a conclusion of
10 law, Justice Ginsburg. So the -- the facts that you know
11 are the facts as they're described --

12 JUSTICE GINSBURG: But it's like was --

13 MR. PHILLIPS: -- by the respondent's brief.

14 JUSTICE GINSBURG: -- the defendant negligent.
15 Is that more or less a conclusion of law? We don't know
16 in what respect from the jury verdict. And here, were
17 these police officers acting -- did they use excessive
18 force.

19 MR. PHILLIPS: Well, we know precisely what they
20 did. They kept her in handcuffs throughout the duration
21 of the -- of the search. We know that. There's no --
22 there are no additional claims as to having mistreated her
23 physically.

24 JUSTICE STEVENS: Wasn't there a fact issue as
25 to whether she was handcuffed for -- even for a short

1 period after the search had been completed?

2 MR. PHILLIPS: I don't think there is a factual
3 question like that because I don't think that question was
4 presented to the jury, and it was certainly not the basis
5 on which the Ninth Circuit affirmed the jury's verdict in
6 this case. There -- there was never an argument made to
7 the jury that this -- that this extended beyond the -- the
8 period of the end of the search. The argument that was
9 made to the jury was that the search should have -- should
10 have been limited to the room where the suspect was -- was
11 a resident or that the police should have made a decision
12 somewhere in the -- before the end of the 2-hour search
13 that she was no longer a threat to them. And then they
14 were arguing that -- that it even went a little further in
15 terms of the timing of it. But they never asked the jury
16 to find that that 15 minutes was the basis for a Fourth
17 Amendment violation in its own right.

18 JUSTICE STEVENS: But if -- but if it made a
19 difference as a matter of law, what -- what should we
20 assume about that extra 15 minutes? Do we assume that
21 they found the facts in the way that the -- a plaintiff
22 argues them or that you think they are?

23 MR. PHILLIPS: I think if the jury had been
24 asked to make that finding, that you -- and -- and the
25 jury determined that there -- that it was unreasonable,

1 then I think you'd have to conclude that the 15 minutes
2 were, in fact -- that it did, in fact, go beyond 15
3 minutes. I do think there is still a legal issue as to
4 whether that's de minimis under the circumstances.

5 But -- but I agree. I mean, obviously there is
6 a role for the jury's findings, and you have to give them
7 a certain amount of respect. But on the core questions of
8 reasonableness and suspicion and whether or not the police
9 exercised unquestioned command and what those terms mean,
10 this Court has already decided that in the Fourth
11 Amendment context it has to decide those issues as a
12 matter of law to regulate the conduct of all police
13 officers and not simply do it on the basis of whatever a
14 particular jury would say in a particular circumstance.

15 JUSTICE SOUTER: Now, in doing it as a matter of
16 law here, should we give consideration to the fact that in
17 this case, if -- if I remember correctly, one of the
18 officers testified that had they followed normal protocol,
19 once they had, I think his phrase was, secured the
20 building, the -- the main building --

21 MR. PHILLIPS: Well, the -- all of the grounds
22 actually.

23 JUSTICE SOUTER: Is that the whole compound?

24 MR. PHILLIPS: Yes.

25 JUSTICE SOUTER: That -- that they would have --

1 they would have taken off the immediate restraints, and he
2 wasn't sure why they didn't. We -- do we -- do we
3 consider that when we're crafting our statement of law as
4 -- as to what is or is not excessive?

5 MR. PHILLIPS: I think if this Court could
6 determine that, as a matter of course, the -- the standard
7 operating procedures in a particular way, that might
8 certainly inform the Court's Fourth Amendment analysis.
9 That -- I think what's important to keep in mind in this
10 context, though, Justice Souter, is we're talking about
11 four individuals who are being detained under these
12 circumstances, and each of them poses a distinct issue for
13 the police officers under the -- under -- when trying to
14 decide how best to proceed. One of them had been found
15 with marijuana in his possession. One of them had been
16 determined to be an illegal alien, and the other two were
17 individuals about whom the police knew virtually nothing.

18 So, you know, is it possible that police
19 procedure, generally speaking, when you're talking about a
20 single occupant of the residence, oftentimes concludes
21 that he can take away -- you can remove the handcuffs?
22 That may be, although I don't think there's much in the
23 record here to -- to reflect that.

24 But what the police said here -- and I think
25 it's extraordinarily important. Officer Muehler testified

1 that if something had gone wrong, if either a police
2 officer had been injured or one of the occupants of that
3 house had been shot or otherwise harmed as a -- in the
4 context of executing the search warrant, the first
5 question that would have been asked is what was the least
6 that could have been done to prevent those injuries from
7 occurring. And he said to himself and he said it quite
8 rightly -- and it's a rule this Court ought to embrace
9 under the unquestioned command theory of -- of law -- is
10 that if we keep them in handcuffs through the duration of
11 a reasonable search, we will make our way through the
12 search much more rapidly, much more efficiently in order
13 to minimize the detention and we will eliminate -- and I
14 mean, literally eliminate -- the entirety of the risk
15 either to the individuals themselves, the occupants, the
16 detainees, or to the police under these circumstances.

17 JUSTICE SOUTER: Okay. I take it you obviously
18 don't want us to -- to come down with a kind of a finicky
19 version of -- of excessive force as the touchstone, and I
20 take it you don't want us to come down with simply a
21 blanket rule saying that essentially the police can do
22 anything in -- in restraining occupants so long as it is
23 not wantonly cruel. Somewhere in between. Do you have a
24 -- a statement that would be the kernel of the holding
25 that you want?

1 MR. PHILLIPS: I'm -- I'm quite comfortable with
2 the way the Court analyzed it in Michigan v. Summers, that
3 the officer is not required to evaluate the extent of the
4 intrusion to be imposed by the seizure. That is, you --
5 you have a categorical rule that allows you, in the
6 ordinary course, to do whatever is reasonably necessary in
7 order to --

8 JUSTICE GINSBURG: But in the facts there, there
9 were no handcuffs. He -- he was just detained. So --

10 MR. PHILLIPS: I understand that, and -- but my
11 -- my position is that handcuffs don't materially affect
12 the detention under these circumstances other than to
13 assure what the Court said, which is unquestioned command
14 of the situation.

15 JUSTICE SOUTER: So -- I mean, I don't -- would
16 -- would you say handcuffs are per se lawful for -- for
17 purposes of applying Summers?

18 MR. PHILLIPS: Yes, but it's important to put
19 that in context because Summers is a narrow exception to
20 the -- not an exception. It's a narrow circumstance under
21 the Fourth Amendment. You have to have a search warrant.
22 It has to be a validly issued search warrant so that we
23 know that there has either been a crime that's likely to
24 be taking place in the premises. It only -- it only
25 extends to the residents, occupants of the house, and it's

1 only when the search is for contraband, not just for any
2 evidence. So, for instance, when the police go the 60th
3 time to Michael Jackson's estate to go try to find
4 evidence of whatever is going on there, I don't think it's
5 reasonable to go in and handcuff Michael Jackson and
6 anybody else who happens to be on site.

7 JUSTICE SCALIA: Well, it doesn't -- why is
8 contraband magical? Wouldn't -- wouldn't your point be
9 when -- when the reason they're investigating gives cause
10 to believe that there may be physical danger --

11 MR. PHILLIPS: Justice Scalia --

12 JUSTICE SCALIA: -- from letting people wander
13 around?

14 MR. PHILLIPS: -- absolutely.

15 JUSTICE SCALIA: Which is the case with
16 contraband, but would be the case for many other reasons
17 as well.

18 MR. PHILLIPS: I think the important point here
19 is that we're talking about guns. These are gangs. These
20 are guns. This is a circumstance that is inherently more
21 dangerous than any other circumstance the police are
22 likely to confront.

23 JUSTICE BREYER: But would you be happy then
24 with a holding that says just what you said? We reaffirm
25 Summers and -- but Summers said special circumstances or

1 possibly a prolonged detention might lead to a different
2 conclusion in an unusual case.

3 And the only verdict part that I think we're
4 concerned with here -- it was not about four people. It
5 was one person, Iris Mena, and in respect to Iris Mena,
6 the jury found that there was a violation of her -- of her
7 Fourth Amendment rights. And as to her, you could have
8 found -- you said -- I don't know if you misspoke. You
9 said it could be more than 15 minutes. In looking at it,
10 I was certain whether they kept her for 15 minutes more or
11 more than 15 minutes more, maybe up to an hour or more
12 beyond the time that the search ended and kept her in
13 handcuffs, both after the time they had secured the place
14 and also after the time the search ended. Well, that
15 would seem a basis for the jury's verdict and consistent
16 with Summers.

17 MR. PHILLIPS: Well, it -- it could have been a
18 basis for the jury's verdict if they had, in fact, put the
19 issue of whether or not they were detained --

20 JUSTICE STEVENS: But, Mr. -- Mr. -- but may I
21 point out that the judge's instructions did put that issue
22 to the jury at page 203. A police officer is required to
23 release an individual detained in connection with a lawful
24 search as soon as the officer's right to conduct the
25 search ends or the search itself is concluded, whichever

1 is sooner.

2 MR. PHILLIPS: Right. That -- I understand
3 that, Justice Stevens, but the point we made in our reply
4 brief is there's not a shred of evidence in this record
5 and it was never argued to the jury that this search --
6 that -- that her detention lasted beyond the period of the
7 search in this case. Indeed, counsel for the police
8 officers specifically said in his closing argument, there
9 is no issue but that she was released at the time of the
10 -- that when -- as soon as the search was -- was ended,
11 the -- the warrant was executed.

12 JUSTICE STEVENS: I wonder why the judge gave
13 this instruction then.

14 MR. PHILLIPS: Because -- because what he's --
15 well, you know, it's a reasonable instruction.

16 JUSTICE GINSBURG: And why -- why there was --
17 there was a special verdict of sorts, not a detailed one.
18 But the two questions, question 5 and question 6, on page
19 255 of the joint appendix --

20 MR. PHILLIPS: Yes.

21 JUSTICE GINSBURG: One question concerns whether
22 the force was excessive, and the other one is, do you find
23 that she was detained for a longer period than reasonable?

24 Those two questions -- my first is a procedural
25 question. Did counsel for the defendants object to the

1 jury getting -- those two questions being submitted to the
2 jury?

3 MR. PHILLIPS: No, Justice Ginsburg. We didn't.
4 And -- and --

5 JUSTICE GINSBURG: Well, it seems to me that the
6 judge is asking the jury in these questions, one is
7 whether there was a -- a detention, was force greater than
8 was reasonable under the circumstances, and whether the
9 duration was longer than reasonable under the
10 circumstances.

11 MR. PHILLIPS: Right. Justice Ginsburg, you
12 have to put that in context. The argument of the
13 plaintiff in this case was that the detention should have
14 ended at either of two points: after they had completely
15 cleared the area and made it safe, or alternatively, at
16 some point after that when they had asked her questions
17 and determined that she had no particular involvement with
18 Mr. Romero. Their argument was anything after that was
19 unreasonable, and that's what the jury certainly found,
20 was that that was the reasonable break point.

21 Our argument is that's not consistent with the
22 notion of unquestioned command and -- and is wrong as a
23 matter of law. And there is no evidence -- no evidence.
24 There was no testimony that she was kept for a period
25 beyond the execution of that search warrant. It's very

1 important to understand that.

2 JUSTICE SCALIA: And you're saying the -- the
3 mere fact it -- it went to the jury, even went to the jury
4 without your objecting to it, does not mean we have to
5 listen to what the jury said. Is that -- is that --

6 MR. PHILLIPS: Right. If it's wrong as a matter
7 of law, that's -- then that's absolutely right. But there
8 was no evidence in this case that they kept going. The
9 only thing he said was, he -- he didn't remember. That
10 was -- the question was put to the police officer. Was
11 she kept beyond there? He said he didn't remember. He
12 wasn't even the police officer who was involved in it.
13 There's not a shred of evidence of that. It's totally
14 made up. It wasn't their theory of the case in front of
15 the jury.

16 I'd like to reserve the balance of my time.

17 JUSTICE STEVENS: You might save your time.
18 Yes.

19 Mr. Shanmugam.

20 ORAL ARGUMENT OF KANNON K. SHANMUGAM

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

23 MR. SHANMUGAM: Thank you, Justice Stevens, and
24 may it please the Court:

25 When executing a search warrant to investigate a

1 violent crime, officers may routinely use reasonable
2 restraints on detained occupants in order to exercise
3 unquestioned command over the situation and to facilitate
4 the orderly completion of the search.

5 The Ninth Circuit erred in holding that the
6 officers' use of handcuffs in this case violated the
7 Fourth Amendment.

8 Under the standard for excessive force claims
9 first articulated by this Court in *Graham v. Connor*, as
10 informed by this Court's decision in *Michigan v. Summers*,
11 the degree of force used here was not excessive. The same
12 considerations that justified the detention of the
13 occupants in *Summers*, most notably, the paramount concern
14 of ensuring the safety of the officers and the occupants
15 themselves, will ordinarily justify the precautionary use
16 of handcuffs during the detention.

17 JUSTICE GINSBURG: Then this case should not
18 have gone to the jury on the basis of what you said --

19 MR. SHANMUGAM: We --

20 JUSTICE GINSBURG: -- because you -- you just
21 said that this -- the handcuffs -- the circumstances --
22 the circumstances here were reasonable as a matter of law.

23 MR. SHANMUGAM: Justice Ginsburg, that's
24 correct. It is our view that as a matter of law, the
25 officers would have been entitled to prevail on the

1 constitutional issue with regard to excessive force. And
2 it's worth noting, I think, that the officers did move for
3 summary judgment. They also orally moved for judgment as
4 a matter of law at the close of the evidence, and that
5 motion was denied.

6 Now, we also believe that the jury, quite
7 frankly, was given insufficient guidance on the excessive
8 force issue, and to turn to the jury instruction cited by
9 Justice Stevens at page 203, it's quite clear that the
10 jury only received one very general instruction on Summers
11 detentions.

12 JUSTICE KENNEDY: Well -- well, has the -- the
13 objection to the instruction been preserved here?

14 MR. SHANMUGAM: Perhaps an argument could be
15 made that it's fairly included within the questions
16 presented. There was an objection made at trial and an
17 objection made before the Ninth Circuit as well, but our
18 fundamental position is that the jury was simply given
19 insufficient guidance on the excessive force issue. This
20 instruction --

21 JUSTICE SOUTER: But on the -- on the question
22 whether they preserved the issue, I -- I took it, implicit
23 in what you said a minute ago, that yes, they did not
24 object to the submission of the question. They did not
25 object, in effect, to an instruction or giving of an

1 instruction as such.

2 MR. SHANMUGAM: That's correct.

3 JUSTICE SOUTER: But they -- they had moved for
4 judgment as a matter of law at the close of all the
5 evidence, and that's enough to preserve the issue?

6 MR. SHANMUGAM: I think that's true. It is true
7 that they didn't object to the specific special verdict
8 set of questions. I think they proposed slightly
9 different language. But ultimately I think our primary
10 submission is that as a matter of law on these facts, no
11 constitutional violation occurred.

12 JUSTICE SCALIA: When you -- is your objection
13 that the jury wasn't given enough guidance on excessive
14 force, or is it that the -- that the ultimate issue of
15 excessive force is not a jury issue?

16 MR. SHANMUGAM: We would concede, I think,
17 Justice Scalia, that the issue should go to the jury where
18 there are disputed issues of historical fact. We would
19 submit that there are no relevant --

20 JUSTICE SCALIA: Well, but is -- is excessive
21 force an issue of historical fact any more than -- than
22 unreasonable search or unreasonable seizure is an issue of
23 historical fact?

24 MR. SHANMUGAM: Well, there are certain --

25 JUSTICE SCALIA: I mean, it's an historical fact

1 how long you held the person, whether the person was in
2 handcuffs, but the ultimate question was, you know, is
3 this force excessive. Is that any different from the
4 question as -- of was this seizure unreasonable? If you
5 submit the one to the jury, you may as well submit the
6 other.

7 MR. SHANMUGAM: Justice Scalia, those facts may
8 be disputed in a particular case. We would submit that
9 they really weren't disputed here, but there may actually
10 be a dispute where the officers would say, yes, we used
11 handcuffs and the --

12 JUSTICE SCALIA: So when --

13 MR. SHANMUGAM: -- or no we didn't use
14 handcuffs.

15 JUSTICE SCALIA: -- when you know all those
16 facts, you're willing to send it to the jury to say, given
17 all of these facts, it's up to you to decide whether
18 unreasonable force was used or not.

19 MR. SHANMUGAM: We believe that it is --

20 JUSTICE SCALIA: It's not a matter of law.

21 MR. SHANMUGAM: -- a mixed question of fact and
22 law, and once the historical facts are established, it is
23 essentially --

24 JUSTICE SCALIA: Why -- why any more so -- why
25 any -- any more so than -- than whether it's an

1 unreasonable seizure?

2 MR. SHANMUGAM: Well, we would submit that it is
3 no different from the question whether officers had
4 probable cause or reasonable suspicion on any given set of
5 historical facts which this Court held in Ornelas was a
6 question subject to de novo review, over your dissent,
7 admittedly. And we believe that the primary rationale for
8 the rule in Ornelas also applies here, namely that
9 officers do need to have a consistent set of substantive
10 guidelines by which they can judge the validity of their
11 conduct.

12 JUSTICE KENNEDY: Are -- are you saying that the
13 only basis on -- on which the jury could have ruled for
14 the homeowner here, the -- the respondent, is that she was
15 handcuffed for too long?

16 MR. SHANMUGAM: We believe that that certainly
17 is the primary issue that was at stake. And in fact --

18 JUSTICE KENNEDY: Well, I think you have to say
19 that. Otherwise, we have to uphold the jury verdict, if
20 we can assume that the jury might have thought, well, you
21 know, the handcuffs -- the police had a right to do that,
22 but she was held too long, she was -- they -- they yelled
23 at her, she was taken into a -- a place that was
24 uncomfortable, blah, blah, blah. If -- if that's true,
25 then we have to sustain the jury verdict.

1 MR. SHANMUGAM: I think that the handcuffing was
2 the key factor at trial, and I think that the best
3 evidence of that, quite frankly, is that respondent in her
4 proposed instructions referred only to handcuffing in her
5 excessive force instruction. Unfortunately, that's not
6 part of the joint appendix. It is part of the record.

7 JUSTICE KENNEDY: No, no. But the instruction
8 that was given -- and one was read that's in the briefs --
9 it seems to me a -- a perfectly good instruction.

10 MR. SHANMUGAM: I think that that's true, but I
11 think that the instruction didn't really provide any
12 guidance on excessive force specifically. It was really
13 an instruction with regard to the reasonableness of the
14 detention more generally, rather than with regard to
15 excessive force specifically. It was not a *Graham v.*
16 *Connor* type instruction.

17 JUSTICE KENNEDY: Well, then it seems to me it
18 was the plaintiff's obligation to submit a clarifying
19 instruction and to bring this -- the denial of that
20 instruction here.

21 MR. SHANMUGAM: Well, there were objections to
22 the instruction below, and all I can say is that perhaps
23 an argument could be made -- and perhaps Mr. Phillips will
24 make the argument on rebuttal -- that it is fairly
25 included within the questions presented.

1 JUSTICE GINSBURG: I don't know how you can --
2 you can say that the only thing that was before the jury
3 was the handcuff when the -- there was evidence that she
4 was treated very roughly in -- in the first instance, she
5 was woken from her sleep, she wasn't told that they were
6 police, she thought they were robbers, and she feared for
7 her life. That doesn't drop out of the case and what the
8 jury was asked to determine.

9 MR. SHANMUGAM: Justice Ginsburg, it was the
10 primary issue before the jury, and to be sure, there were
11 other issues. I think that the other relevant use of
12 force was the initial detention at gunpoint, but -- and
13 those -- and I would add that those are the two factors on
14 which the Ninth Circuit relied in affirming the jury's
15 verdict. Our submission is that both with regard to the
16 initial use of force and with regard to the continued use
17 of force, the justifications of *Graham v. Connor* support
18 the officers' use of force in both instances.

19 JUSTICE STEVENS: But -- but may I just ask a
20 sort of very basic question? One of the instructions
21 reads, a detention may be unreasonable if it -- if it is
22 unnecessarily painful, degrading, prolonged, or if it
23 involves an undue invasion of privacy. Now, are you
24 telling us that you think the answer to that question is a
25 question of law that the judge should provide rather than

1 the jury?

2 MR. SHANMUGAM: Assuming that that instruction
3 is correct -- and that might very well be a valid
4 instruction --

5 JUSTICE STEVENS: Well, if you think was
6 correct.

7 MR. SHANMUGAM: It may very well be a correct
8 instruction --

9 JUSTICE STEVENS: All right.

10 MR. SHANMUGAM: -- with regard to a challenge to
11 the manner of the detention itself. In that instance,
12 then the jury does have a certain amount of leeway, but I
13 think even then the teaching of Ornelas --

14 JUSTICE STEVENS: Then it's not a question of
15 law. The answer to whether it was unnecessarily painful,
16 degrading, prolonged, or involved undue invasion of
17 privacy, is that a question of law or a question of fact
18 to the jury?

19 MR. SHANMUGAM: It is a mixed question of law
20 and fact, and the jury's job is --

21 JUSTICE STEVENS: It's a mixed question?

22 MR. SHANMUGAM: The jury's job is to -- to
23 resolve the underlying factual issues and then --

24 JUSTICE STEVENS: Well, I understand the
25 historical fact, but I'm -- I'm questioning you about the

1 conclusions that you draw from the unreasonableness,
2 degrading, and so forth. Is that partly to be decided by
3 the jury or entirely by the judge?

4 MR. SHANMUGAM: We believe that that actually is
5 ultimately a judge issue in the same way that the issue of
6 whether or not probable --

7 JUSTICE STEVENS: So this instruction should not
8 have been given.

9 MR. SHANMUGAM: That's correct --

10 JUSTICE SOUTER: I thought your position was
11 that it -- it may be submitted to the jury, but that it
12 may be reviewed as a question of law simply because that's
13 the way we are able to set standards for later cases.

14 MR. SHANMUGAM: I think that's exactly right,
15 and I think that that is the teaching of Ornelas. And it
16 may very well be that a more specific instruction should
17 have been given so as to make clear that the jury had
18 specific issues of historical fact to resolve. But
19 ultimately we do believe that it's a question of law in
20 the sense that it should be reviewed de novo for precisely
21 the reasons given in Ornelas.

22 And if I could just say a couple words on the
23 substantive issue of excessive force. We believe that in
24 cases involving violent crimes, officers should routinely
25 be allowed to use handcuffs. In this case, I would just

1 add that there were several additional case-specific
2 factors that justified the use of handcuffs. In addition
3 to the fact that this was a violent crime, the officers
4 had reason to believe that at least one and possibly two
5 members of a violent gang were living at the house. In
6 addition, the officers had previously visited the house on
7 two occasions to investigate other violent crimes and had
8 encountered resistance on at least one of those occasions.

9 And our fundamental problem with the Ninth
10 Circuit's rule is that it seems to suggest that officers
11 in the course of a detention should really stop and
12 investigate whether or not each -- each individual that
13 they encounter poses a safety threat. And we believe that
14 that rule is as unworkable as it is unwise. It would
15 effectively divert officers from the primary task at hand
16 and could perversely have the effect of prolonging rather
17 than expediting the completion of the search. And for
18 that reason, we believe that the Ninth Circuit's rule, its
19 substantive constitutional rule, was erroneous.

20 JUSTICE STEVENS: How long did it take them to
21 find out whether the -- these other dangerous people were
22 there?

23 MR. SHANMUGAM: To find out whether?

24 JUSTICE STEVENS: Whether the people they were
25 afraid of were -- were on the premises?

1 MR. SHANMUGAM: Well, you know, I don't know
2 that they ever actually made a -- a determination other
3 than that Mr. Romero was not on the premises. I think
4 they figured that out once they had actually identified
5 each of the individuals, which was fairly early on in the
6 detention.

7 JUSTICE STEVENS: Thank you.

8 Mr. Hoffman.

9 ORAL ARGUMENT OF PAUL L. HOFFMAN

10 ON BEHALF OF THE RESPONDENT

11 MR. HOFFMAN: Justice Stevens, and may it please
12 the Court:

13 Let me start on the issue of -- that Mr.
14 Phillips said we made up. Actually we didn't make it up.
15 The claim that Ms. Mena was detained past the time of the
16 search was made throughout the case. If you look at
17 footnote 3 in the Ninth Circuit opinion in 2000, the issue
18 of the length of the detention was a factual issue that
19 precluded summary judgment. Ms. Mena claimed that the
20 detention lasted for 2 to 3 hours. The officers claimed
21 that it lasted 90 minutes.

22 But more than that, the -- the jury -- the --
23 the special verdict asked the jury to find whether Ms.
24 Mena had been kept for a longer time than reasonable, and
25 in fact, in the closing argument, it was argued that Ms.

1 Mena had been kept beyond the time that the search ended.

2 And not only is there not any -- not only is
3 there evidence in the record, there is overwhelming
4 evidence in the record that Ms. Mena was kept for a period
5 of time, at least 30 minutes, give or take, and possibly
6 as long as an hour. And this is not based on Ms. Mena's
7 testimony.

8 JUSTICE KENNEDY: Do you find that the -- that
9 the -- do you define the end of the search as before they
10 started videotaping everything they had done?

11 MR. HOFFMAN: Well, they were videotaping during
12 the course of the search. But if I can go through the
13 facts which might clarify things.

14 Officer Muehler, who was the officer in overall
15 charge of the -- of the search, testified at trial that
16 the search ended at 8:40 a.m. Officer Brill said a little
17 bit later than that. He tied -- but there's a second
18 video. There are two videos. The second video is from
19 8:50 to 8:57. At the time that the second -- the second
20 video started at 8:50, Officer Brill testified that the
21 search was over. The -- the evidence log -- the last
22 entry on the evidence log is 8:45 in terms of evidence
23 being logged into the -- into the case.

24 Officer Brill testified that Ms. Mena was kept
25 for at least 10 or 15 minutes after the end of the second

1 video and her handcuffs were not released until she was
2 brought back around from the -- the separate converted
3 garage back into the house and --

4 JUSTICE GINSBURG: Where -- where is that
5 testimony?

6 MR. HOFFMAN: The testimony -- Officer Brill's
7 testimony? Is actually -- they cite joint appendix number
8 -- on 75 where he says he doesn't recall. On the next
9 page, in joint appendix number 76, he's asked -- they
10 continue to ask the question. And isn't it your memory
11 that about 10 or 15 minutes after that, Iris Mena was
12 released? That would sound consistent. And that's 10 or
13 15 minutes after 8:57.

14 In addition, Ms. Mena testified that she was
15 kept between 2 or 3 hours, and that was actually
16 consistent with prior testimony by the videographer
17 herself, who testified in deposition and was impeached at
18 trial, that it was 2 or 3 hours that the search lasted.

19 The -- the point being -- and if you take the
20 distance between Officer Muehler's testimony and Officer
21 Brill's testimony, Ms. Mena was -- was kept in handcuffs
22 at the end of a very long detention in handcuffs, for a
23 period of approximately 27 to 33 minutes, if you don't
24 even take Ms. Mena's testimony into account.

25 And one of the ironies of the case is that

1 there's testimony that Mr. Romero, the actual target of
2 the case, was released at 8:45 at the time the search
3 ended. And so while this --

4 JUSTICE GINSBURG: But not from these premises.

5 MR. HOFFMAN: No. But in fact, this was a --
6 the search warrant was for two premises. He was picked up
7 at his mother's house. And in fact, Officer Muehler had
8 -- was -- was to radio the start of both searches, and so
9 there was --

10 JUSTICE GINSBURG: But the -- the -- I thought
11 that this poorhouse, or whatever it was called -- that the
12 warrant covered weapons that were there.

13 MR. HOFFMAN: Yes.

14 JUSTICE GINSBURG: That they were looking for
15 weapons.

16 MR. HOFFMAN: They were looking for a gun.

17 JUSTICE GINSBURG: They were not looking for a
18 gun at Romero's mother's house, were they?

19 MR. HOFFMAN: Well, I think the --

20 JUSTICE GINSBURG: Did they have a warrant, a
21 search warrant?

22 MR. HOFFMAN: I think the warrant covered -- I
23 think they were looking for the gun wherever it was found,
24 and -- and the -- I believe the warrant --

25 JUSTICE GINSBURG: Well, this was a -- this was

1 a pretty extensive search warrant that they had.

2 MR. HOFFMAN: Yes.

3 JUSTICE GINSBURG: Did they have something like
4 that, the same kind of warrant for the --

5 MR. HOFFMAN: Well, it's the same warrant I
6 believe, Your Honor, in terms of -- we don't have --
7 there's not a lot of information in the record about --

8 JUSTICE GINSBURG: Well, wasn't -- I thought
9 that this warrant referred to a particular address, a
10 particular house, not -- not any house where one might
11 find Romero.

12 MR. HOFFMAN: No, no, no. It -- it referred to
13 the two houses, one on Cimmaron.

14 JUSTICE GINSBURG: Well, was the other house his
15 mother's house?

16 MR. HOFFMAN: Yes. The location number one is
17 his mother's house, 2646 Cimmaron, and that's -- and
18 Officer Muehler and this team was in charge of both of
19 these searches pursuant to the same warrant. They had
20 information that -- the reason they did that is that they
21 had information that -- that he lived in this poorhouse,
22 that he rented a room from the Menas at the poorhouse, and
23 that he also visited his -- his mother from time to time.

24 JUSTICE GINSBURG: Then that would make it even
25 more curious if the place where the dangerous man was

1 wasn't searched extensively and -- and the mother --
2 nobody was put in handcuffs, and yet for this -- they knew
3 pretty soon that Romero wasn't on the premises.

4 MR. HOFFMAN: Well, they knew right away.

5 JUSTICE GINSBURG: Yes. And that's, I guess,
6 your -- your point, that the place where the dangerous man
7 was is not --

8 MR. HOFFMAN: I think that that explains one of
9 the reasons why the jury imposed punitive damages here
10 because they -- they knew that at 8:45, at the time that
11 Officer Muehler said that the search was over and all the
12 officers were out of the house and -- and everything was
13 done, that Mr. Romero was cited and released for marijuana
14 possession. And at the same time, from 8:45 until
15 sometime after 9 o'clock, probably as long as 30, maybe
16 longer, Iris Mena was sitting in a cold, damp, converted
17 garage with her hands behind her back.

18 JUSTICE BREYER: You might be able to keep your
19 verdict, I -- I think. But I think the problem here is
20 the Ninth Circuit -- you go to the Ninth Circuit and you
21 say, you know, there was excessive force here on anybody's
22 definition for reasons that you say. And -- and the Ninth
23 Circuit says, oh, it was a clear violation of the
24 Constitution and we'll tell you why, and then they give
25 some reasons. And two of those reasons are, A, four and a

1 half pages written the reason that this was
2 unconstitutional is because they asked her questions about
3 immigration status, which you -- I don't think you even
4 raised. Maybe you did. But anyway, that's -- that's the
5 bulk of the -- of -- of -- that's the bulk of the
6 analysis.

7 And -- and these are the words that I think
8 they're objecting to. And by any standard of
9 reasonableness, Mena was -- the -- the officers should
10 have released her from the handcuffs when it became clear
11 that she posed no immediate threat. And that was long
12 before the -- the -- because she wasn't a threat. And
13 that was long before the end of the search.

14 And what their point is on that is, you know, if
15 that's the rule, that's going to interfere with our SWAT
16 teams because they can't operate that way. They -- they
17 can't evaluate the individual. They put the individual --
18 if there are guns and gangs and danger that she'll grab a
19 gun, they put her in handcuffs, and they hold her there
20 for the search for a couple of hours, then they release
21 her. Now, that's their argument.

22 So they're objecting not so much to -- to the
23 fact they have to pay \$30,000 -- or they may object to
24 that. But they're -- they're objecting to the holding of
25 the Ninth Circuit, and if they're right on that, then I

1 guess we have to send it back and say, do this over again,
2 though I'll be sorry about that and maybe there is a way
3 not to do it.

4 But -- but I want to know your view of what I
5 see as those two issues here, that the Ninth Circuit's
6 analysis was wrong.

7 MR. HOFFMAN: Yes. I mean, first of all, I'd --
8 I'd say that the -- the Court could affirm the judgment in
9 this case and the verdict in this case on the ground that
10 we --

11 JUSTICE BREYER: Yes, but then we can't really
12 reach the issue. That's a possibility. I see that.

13 MR. HOFFMAN: And in fact -- and I -- I think
14 that would be the appropriate thing to do.

15 JUSTICE BREYER: Well, but then suppose that the
16 reason that this case is here is because of the
17 implications --

18 MR. HOFFMAN: Right.

19 JUSTICE BREYER: -- of the Ninth Circuit's
20 analysis --

21 MR. HOFFMAN: Right.

22 JUSTICE BREYER: -- not necessarily the extra 30
23 minutes because I see your point on the extra 30 minutes.

24 MR. HOFFMAN: I think -- I think that there -- I
25 would divide my response to that, Justice Breyer, into two

1 parts really. On the questioning issue, I would just say
2 that that -- that was not an issue that was presented to
3 the jury for its verdict as a separate Fourth Amendment
4 violation. It wasn't. And we didn't argue it in the
5 Ninth Circuit.

6 What we did -- we did say in our -- in our brief
7 to the Ninth Circuit that she was questioned about her
8 immigration status about an issue that was unrelated to --
9 to Summers detention. We did say that.

10 JUSTICE BREYER: Well, we could say is their
11 opinion -- that's their opinion. It's beside the point,
12 et cetera.

13 MR. HOFFMAN: Right. So, I mean, I -- I think
14 on questioning, you know, we -- we haven't been pushing
15 that issue.

16 JUSTICE SCALIA: If -- if two of the reasons
17 that the Ninth Circuit gave are in our view incorrect, why
18 wouldn't we reverse and remand for them to do it without
19 -- to make the judgment without taking those two factors
20 into account?

21 MR. HOFFMAN: Well, I think what -- first of
22 all, it's a separate alternative holding. What they said
23 is that there was a separate Fourth Amendment violation
24 while they affirmed on the basis that we actually won on.
25 The jury found that she had been detained longer than was

1 reasonable and with more force than was reasonable. This
2 is a jury verdict. The Ninth Circuit affirmed that.

3 And we've argued in our brief that if the Court
4 did something on questioning, it would really be issuing
5 an advisory opinion in this -- in this situation. And,
6 you know, we've -- we've argued the point and we're
7 prepared certainly to argue about the merits of that
8 question because it's obviously an important question. In
9 our view, the questioning issue should be governed by the
10 more traditional Terry kind of idea that you can't
11 question when it goes beyond the scope of the limited
12 purposes of the intrusion, but we also understand that
13 that's contested.

14 JUSTICE KENNEDY: Well --

15 JUSTICE SCALIA: I don't --

16 JUSTICE KENNEDY: -- well, it does seem to me
17 that --

18 JUSTICE SCALIA: Excuse me.

19 JUSTICE KENNEDY: It -- it does seem -- seem to
20 me that the Ninth Circuit's opinion is questionable on --
21 on this key point of when she had to be released. The
22 officers should have released her when it became clear she
23 posed no immediate threat and did not resist arrest.

24 MR. HOFFMAN: Well --

25 JUSTICE KENNEDY: I think that is critical to

1 its holding.

2 MR. HOFFMAN: Well --

3 JUSTICE KENNEDY: And that implies that they
4 have a -- a duty at the outset to determine whether --
5 what her status is rather than to go around looking for
6 guns and -- and to secure the premises. That's -- that's
7 one of my concerns with that.

8 MR. HOFFMAN: Well, I would have a different
9 position on that. First of all, I think that the judgment
10 can actually be affirmed on the first ground regardless of
11 this issue because it was a -- a jury verdict and -- and
12 the damages were asked for either/or in terms of question
13 5 or 6.

14 JUSTICE KENNEDY: The -- the first ground being?
15 Just an unreasonably long --

16 MR. HOFFMAN: Detained beyond the -- the length
17 of the search. And I think technically the judgment can
18 be affirmed on that ground.

19 But with respect to the handcuffing, the
20 position that we would say is that, first of all, you --
21 you would have to view the facts in the light most
22 favorable to the verdict. Now, it's been -- there's been
23 a lot of questioning about what that means and what the
24 jury's role is. As we understand it, if Ornelas applies
25 to this decision, which we assume the Court would do --

1 and that is, that you would first have to take the light
2 -- all the facts in the light most favorable to the
3 verdict, including the possibility that the -- the jury
4 rejected as being incredible the statements that the
5 officers made in terms of justification, if there was
6 evidence in the record to show that there was
7 contradicting evidence, which there is in this record.
8 And so the facts that -- that the other side has tried to
9 argue are the facts on which you would make that
10 constitutional decision are not the facts in the light
11 most favorable to the verdict.

12 In the light most favorable to the verdict,
13 there was -- there was lots of planning. There was a
14 tactical plan in writing that the jury got to see, which
15 said that the -- the plan here was to go in and make the
16 SWAT entry, to see if there were non-suspects there. They
17 would be patted down, identified, and released. The jury
18 was entitled not to believe the other side's claim that
19 they didn't say when they were going to be released and
20 believed that the plan was to release them as soon as it
21 was ascertained that they did not have the connection in
22 -- in the situation. And in fact, there's testimony from
23 the officers that they knew that they weren't gang members
24 and they knew that they weren't connected to the crime.
25 And they were completely cooperative, and they didn't

1 resist arrest and they didn't flee. And Iris Mena is 5
2 foot 1 -- 5 foot 2 inches, and the jury had a videotape of
3 exactly how they looked.

4 The officers had a total plan. They -- they
5 exercised their command of the situation from the
6 beginning. They cleared it. They made sure it was safe.
7 They took people outside through the pouring rain, which
8 actually they say there wasn't evidence about that.

9 JUSTICE GINSBURG: Medium -- medium rain.

10 MR. HOFFMAN: Well, actually at -- at joint
11 appendix number 183, Officer Allegra, who was one of the
12 entry team, said it was pouring. So -- and in fact, the
13 stipulation of facts said it was heavy. So Iris Mena was
14 being -- was being demure when she talked about that. You
15 can even see the rain on the videotape.

16 And so they took her outside. They took all of
17 them outside. They put them in this little room, which is
18 not connected to the house. They had one or two armed
19 officers outside. There was no place for them to go.
20 They couldn't interfere with the facilitation of the
21 search because they were in this room. They couldn't flee
22 because there's only one way out, a door. There were two
23 armed guards there. And -- and if all they had to do was
24 sit these four people, who were not connected to any gang
25 activity, as to which they had no suspicion ever developed

1 that they had any connection to Mr. Romero, who had
2 already been arrested at his mom's house --

3 JUSTICE SCALIA: They can't have a flat rule
4 that while you're conducting a search, you -- you can
5 restrain anybody that you find assuming the search is for
6 a crime that -- that involves violence.

7 MR. HOFFMAN: Well, I think that the --

8 JUSTICE SCALIA: I don't want to have to make
9 that call all the time, you know.

10 MR. HOFFMAN: Well, but -- but officers do make
11 that call all the time. They make it in the context of
12 Terry stops. They make it in the context of lots of
13 Fourth Amendment issues.

14 In Summers -- in Summers, the man was detained.
15 In many of the post-Summers cases, including many cited by
16 the other side and the Government, handcuffing is not
17 viewed as routine. Handcuffing is viewed as something
18 that substantially aggravates the nature of the seizure --

19 JUSTICE BREYER: That's true. It isn't routine
20 in -- I mean, here what sort of pushes the other way on
21 this is this is a dangerous gang. They have lots of
22 weapons and they have previously gone to this house, which
23 I gather -- sometimes when I read it, I think it's like a
24 warren of little rooms. On the other hand, maybe it
25 isn't. I haven't seen the house. There are a lot of

1 buildings around, and they think a lot of people here --
2 we don't know who's what, and we make a mistake in this
3 and we're dead. You know, I mean, so that's painting it
4 the other way.

5 But where you have guns and -- and houses and
6 gangs and so forth, now that's why they say that it's
7 reasonable in those circumstances to say, when we find
8 someone in the house, we handcuff them through the search.
9 We might let them go earlier, but that's up to us and we
10 don't want the courts second guessing us on that.

11 Now, what's -- I'm painting it their way, and
12 I'd like you to respond.

13 MR. HOFFMAN: I -- I understand that. I guess
14 the -- the problem with that is that that means that no
15 matter who they find -- and in this case is a good example
16 of it. They were worried that they might find the gang
17 member who had a gun there, and that's what they were
18 looking for. Okay. And so they used the SWAT team. That
19 seems perfectly reasonable that they would use a SWAT team
20 the way they did. And they went in and within literally 4
21 or 5 minutes, they had -- this is a tiny, little house.
22 They had cleared the house. They had figured out all the
23 occupants. They put them in a room completely under their
24 control where they couldn't get away from anything. They
25 knew there were two 40-year-old people, a young hippie,

1 and -- and an 18-year-old girl that was 5 foot --

2 JUSTICE BREYER: Did they search that room?

3 MR. HOFFMAN: Yes. They searched that room. So
4 the room was searched before they went there. They
5 searched all the rooms. They searched Ms. Mena's room and
6 found absolutely nothing there.

7 And -- and the testimony -- and this goes to
8 Justice Souter's question.

9 JUSTICE SOUTER: Did they -- did they search the
10 individuals too to make sure --

11 MR. HOFFMAN: Yes.

12 JUSTICE SOUTER: I assume they did.

13 MR. HOFFMAN: Oh, yes. They -- they searched
14 the individuals. They -- they -- you know, they
15 completely made sure that -- that when they put them in
16 that back room, there was nothing in the room. There was
17 nothing on the individuals. There was nothing that --
18 that could cause them danger.

19 And -- and the jury, I think, was entitled to --
20 to look at those facts and -- and to hear the facts and to
21 see the facts --

22 JUSTICE O'CONNOR: How did the qualified
23 immunity question get resolved here?

24 MR. HOFFMAN: Well, the --

25 JUSTICE O'CONNOR: And what -- what role did

1 that play in all of this?

2 MR. HOFFMAN: Well, at the -- at the district
3 court level, the -- the district court heard a rule 59.
4 But one of the things about this case is it was tried
5 right around the time that Saucier v. Katz came out, and
6 in the Ninth Circuit, there was a question about who got
7 to decide qualified immunity. This was June 2001
8 actually. And so there was a rule 59 motion about whether
9 the proper standard of qualified immunity had been
10 applied.

11 The district judge, looking at the facts, found
12 that there were facts to sustain the verdict, including
13 evidence that Ms. Mena had been kept after the end of the
14 search. The district judge found that. And then in -- in
15 the Ninth Circuit, of course, the Ninth Circuit's
16 published opinion deals with qualified immunity on both of
17 these issues.

18 And basically the -- the qualified immunity --
19 on the -- on the over-detention claim, I think they've
20 conceded that there just isn't any justification for -- I
21 mean, a de minimis exception doesn't extend to 30 minutes.
22 I mean, that -- this Court has debated whether 15 or 20 is
23 too long on a -- on a Terry stop when there's actually
24 reasonable suspicion. Here, there's nothing to hold her.

25 With respect to the handcuffing issue --

1 JUSTICE SCALIA: Is it clear that it was 30?

2 MR. HOFFMAN: Well, I think in viewing the light
3 most favorable to the verdict, I think the Court has to
4 assume that -- that the jury could have found an hour.
5 But what I'm saying is based on the officer's own
6 testimony alone, viewed in the light most favorable to the
7 verdict, it's at least 27 to 32. And so you've got
8 something that just could not possibly be considered de
9 minimis under any kind of exception.

10 And -- and that's why they fought it on the
11 facts. They haven't even made an argument on the law at
12 any point in this.

13 And with respect to handcuffing, I think our
14 position on the handcuffing is that Summers, first of all,
15 doesn't deal with handcuffing. And the other side has
16 consistently tried to equate detention with restraint.
17 And I think what -- what Summers indicated was that this
18 Court was willing to allow people to be detained during
19 the course of a search for three specific reasons. And
20 when balancing the nature of the intrusion against the
21 justifications, this Court specifically said it was
22 endorsing a limited intrusion, and that it wouldn't be
23 very much different asking someone to sit around --

24 JUSTICE KENNEDY: Doesn't that just go to the
25 point that it's not clearly established at least?

1 MR. HOFFMAN: Well, no. I -- I don't think that
2 is the case, Justice Kennedy, because in -- in -- Summers
3 doesn't authorize what they did. Graham certainly talks
4 about having to justify force based on a -- on a Fourth
5 Amendment analysis. And Franklin v. Foxworth, which is a
6 Ninth Circuit case that happened before this case, the
7 Court, first of all, used the -- the analysis that we have
8 argued is appropriate based on Summers and Graham to
9 decide that a particular Summers detention was carried out
10 in an unreasonable manner.

11 JUSTICE KENNEDY: Well, but that was ill
12 individual, a single individual --

13 MR. HOFFMAN: Well --

14 JUSTICE KENNEDY: -- unclothed, et cetera --

15 MR. HOFFMAN: No. I -- I understand that the
16 facts were more egregious, but the -- the Court's analysis
17 for a reasonable officer from a qualified immunity
18 standpoint -- for a reasonable officer reading that
19 opinion, you draw at least three conclusions I think. One
20 is that the proper analysis to determine whether
21 handcuffing or some additional form of restraint is -- is
22 allowed has to be decided under the kinds of
23 justifications that Summers provides and under a Graham
24 analysis when it comes to force. And there's lots of
25 cases that -- that allow officers to do that. Lots of

1 lower court cases. In fact, our view is all the lower
2 court cases follow that kind of analysis and just come out
3 differently depending on the facts and circumstances
4 confronted.

5 The second thing, the -- the point about the
6 disabled person and the particular facts made that case
7 particularly egregious, and the Ninth Circuit said those
8 were additional factors, not the line. The Ninth Circuit
9 didn't say that the constitutional standard was
10 particularly abusive or egregious. It -- it applied
11 traditional Fourth Amendment analysis.

12 And finally and I think very important and not
13 dealt with maybe in the briefs as much as it should be is
14 that the Ninth Circuit in -- in Franklin rejected a
15 blanket handcuffing policy. That's what the policy was in
16 Portland. The Portland police department had a policy
17 that said you are to handcuff everybody until the search
18 is over. And the Ninth Circuit said you can't have that
19 kind of policy because Summers and -- and Graham require
20 it to be individualized justification for that -- for an
21 additional intrusion beyond the limited intrusion that's
22 allowed in Summers.

23 And in fact, in Summers, the Court went out of
24 its way to say to compare with what the Court was allowing
25 to what it -- to -- to the circumstances in Dunaway, to --

1 to circumstances that start to look like an arrest. And I
2 don't know how much more intrusive you could be than what
3 these officers did to Iris Mena, and I think that's one of
4 the -- the issues here. If -- if the --

5 JUSTICE O'CONNOR: And what do we do if we think
6 the Ninth Circuit was off base in -- in whether Mena could
7 be questioned about her immigration status?

8 MR. HOFFMAN: Well, I -- I think that --

9 JUSTICE O'CONNOR: That seemed to be an
10 important part of the Ninth Circuit's rule.

11 MR. HOFFMAN: Well, it's certainly -- it's
12 certainly an alternative ground. It's not -- it doesn't
13 affect, I think, our verdict. And so I think what -- I
14 mean, I suppose the Court could dismiss that question as
15 improvidently granted, could say to the court that it --
16 that it should reverse that part of the ruling.

17 JUSTICE O'CONNOR: It might be useful to say
18 they were wrong in --

19 MR. HOFFMAN: Well, that -- you -- you could say
20 that. I mean, I would -- on the merits of the question, I
21 -- I would like to -- if we were reaching that, I would
22 argue that the Ninth Circuit -- that -- that there is --
23 there should be a limit on questioning in a -- in a
24 Summers detention, and the Court should apply the kind of
25 Terry analysis that the majority of the -- the circuits

1 apply.

2 JUSTICE KENNEDY: What -- what will do if we
3 thought the Ninth Circuit was egregiously wrong on that
4 and that its opinion was, to use the most polite word,
5 disingenuous when it talked about a garage? That -- that
6 was somewhat off-putting to me when it was a converted
7 garage with a bed.

8 MR. HOFFMAN: Well, I mean --

9 JUSTICE KENNEDY: I mean, I -- I thought this
10 woman was standing in -- by some grease rack or something
11 and she was --

12 MR. HOFFMAN: She wasn't standing by a grease
13 rack, but she was made to sit initially by an open door
14 because the door had basically been obliterated on a very
15 cold, rainy February morning where she was very cold, and
16 after -- and had been taken through the -- the pouring
17 rain in bare feet and with only a T-shirt and was left
18 there for at least 20 or so minutes without being given a
19 coat or shoes. And she was made to sit by there and she
20 was very cold and uncomfortable. And she did complain
21 that the handcuffs were too tight and she complained that
22 they were uncomfortable and could they be removed.

23 It's not a garage in -- in the way that the
24 vision of it, but also if you look at it, it's -- and the
25 -- the jury did look at it because it had a videotape of

1 this. You could see that the -- the occupants were made
2 to be in a very uncomfortable situation that was
3 unnecessary. And that -- that was clearly established law
4 in the Ninth Circuit certainly under Franklin that the
5 manner of a search that was unnecessarily prolonged or
6 painful or an unnecessary invasion of privacy was clearly
7 established law in the Ninth Circuit as of 1994.

8 I think in the Heitschmidt case, which is very
9 similar in a lot of ways to our case, that came out after
10 the search, but applied the same reasoning to a 1994
11 search. You had the same kind of handcuffing of a non-
12 suspect as to whom the -- the officers didn't have that --
13 that kind of -- of suspicion. And the Fifth Circuit found
14 that that was a violation and denied qualified immunity to
15 the officers.

16 So from our standpoint, on the issue of being
17 detained past the time, I think it's just a clear case. I
18 think the other side has conceded that if -- if there's
19 this evidence in the record, which there is, the judgment
20 has to be affirmed on that basis.

21 On -- on the handcuffing issue, we believe the
22 same principle has to apply because the facts have to be
23 viewed in the light most favorable to the verdict, and
24 when you view those facts, I -- it -- it is -- no
25 reasonable officer would believe you could do those things

1 to Ms. Mena in these circumstances based on the law at the
2 time.

3 And I think that it would be -- what the -- what
4 the United States and -- and what petitioners' counsel is
5 asking for is really for a radical change of law
6 themselves. We're happy with Summers and Graham and the
7 way that applies, and the -- the jury instruction was
8 based on -- on Summers and Graham and on Franklin. The
9 language is taken directly from those cases.

10 And -- and the -- the jury in a case like this
11 -- qualified immunity obviously provides some protection
12 for -- for officers that when -- when a reasonable officer
13 wouldn't know these things. But jury verdicts also play a
14 crucial role in a civil rights case. In this case, a jury
15 of our community found that Iris Mena had been subjected
16 to an abuse of -- a specific abuse of authority in being
17 held beyond the time of -- of the search, even at a time
18 when the prime target was -- was free to go about his
19 business with a citation, and was held in these painful
20 handcuffs for a period of over 2 hours in circumstances
21 where, in the totality of the circumstances, she was
22 treated much more harshly than anything this Court, I
23 think, contemplated in the Summers case.

24 And I think that officers know how to --
25 officers know how to handle the Fourth Amendment issues

1 involved in this case. They don't need a special rule
2 because that rule would end up meaning that when you go in
3 and you don't find what you're afraid of, that everybody
4 is still going to be subjected to this kind of serious
5 intrusion on their individual liberty. And so we would
6 urge the Court not to go down this new path that the
7 United States and the petitioners are asking and to affirm
8 the judgment because it was based on clearly established
9 principles that this Court and other courts around the
10 country have -- have established.

11 Thank you very much.

12 JUSTICE STEVENS: Thank you, Mr. Hoffman.

13 Mr. Phillips, you have about 3 and a half
14 minutes.

15 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

16 ON BEHALF OF THE PETITIONERS

17 MR. PHILLIPS: Thank you, Justice Stevens.

18 I want to start with essentially the question
19 that Justices Breyer and Kennedy raised, which is what do
20 you do when you know that the Ninth Circuit is wrong, that
21 the questioning here violated the Fourth Amendment, and
22 what do you do when you know that the Ninth Circuit was
23 wrong in saying that the officers have an affirmative duty
24 in the middle of a Summers detention to make an assessment
25 on an individualized basis as to the risks posed by any

1 individual detainee. Those are rulings that I submit to
2 you are plainly erroneous and warrant reversal on that
3 basis alone.

4 At that stage, if the respondent wants to argue
5 to the Ninth Circuit that that 15 minutes is, in fact,
6 proved by the facts of this case, that's fine, but
7 understand, those issues were put to the Ninth Circuit,
8 and the Ninth Circuit did not affirm on the alternative
9 ground that there were 15 minutes here. The Ninth Circuit
10 expressly never -- or didn't expressly but never said one
11 word about a period of time after the search ended in this
12 particular case, and that's not an accident because there
13 is no testimony. The officer said he didn't remember and
14 when asked, well, would 10 to 15 minutes be consistent
15 with your memory, well, of course, it would. He didn't
16 remember anything. So there's nothing in that evidence,
17 and there's no way -- I have looked at that tape. I ask
18 you to look at that tape. I guarantee you there's no way
19 you can draw any inference as to at what point in this
20 process she was released vis-a-vis the end of this
21 particular -- this particular search being executed.

22 JUSTICE BREYER: So -- so do we have the tape
23 here?

24 MR. PHILLIPS: I assume you have the tape. It's
25 part of the record. It should be in the clerk's office.

1 If you don't have it, I'd be more than happy to send you a
2 copy.

3 The --

4 JUSTICE GINSBURG: But there was no -- there was
5 no objection to that question going to the jury, was the
6 duration unreasonable.

7 MR. PHILLIPS: Of course not, Justice Ginsburg,
8 because the issue before the jury was whether or not the
9 -- we had an affirmative duty to make an evaluation in the
10 middle of the search as to whether or not she posed a -- a
11 threat. That was --

12 JUSTICE GINSBURG: But the jury --

13 MR. PHILLIPS: -- their theory of the case, and
14 that's what the Ninth Circuit said, is yes, we do have
15 that affirmative obligation.

16 JUSTICE GINSBURG: But the jury answered the --
17 just the general question, was the duration unreasonable,
18 and the jury said yes.

19 MR. PHILLIPS: Not of the search. Of her
20 detention.

21 JUSTICE GINSBURG: Yes.

22 MR. PHILLIPS: Yes, of her detention. And that
23 was based on the jury's determination that we had detained
24 her beyond the period we had done the sweep.

25 JUSTICE GINSBURG: So if the district court got

1 it right and the Ninth Circuit wrote a poor opinion, why
2 should we upset the judgment in the case? In other words,
3 if what we had here was a trial that was okay, a district
4 judge that behaved -- gave a proper charge, then the Ninth
5 Circuit writes an opinion that doesn't seem to deal with
6 what the district court and the jury decided.

7 MR. PHILLIPS: Well, the -- the court of
8 appeals' obligation here was to evaluate our argument that
9 we should -- we were entitled to judgment as a matter of
10 law. The court of appeals put forth what it regarded as
11 the most legitimate bases on which to affirm the judgment
12 in this case. The fact that neither of those withstand
13 serious scrutiny, Justice Ginsburg, seems to me to be a
14 basis for reversing the Ninth Circuit and allowing the
15 matter to go back at this point.

16 And -- and that is exactly what this Court does
17 in -- you know, said it will do in Ornelas, that it is a
18 de novo review. Punitive damages, exactly like a punitive
19 damages cases. Juries make punitive damages
20 determinations every day and every day courts of appeals
21 and trial judges review those damages awards de novo
22 because they -- because the question is not just what are
23 the historical facts -- that you give deference to the
24 jury on -- but on the fundamental question of what is the
25 rule of law that will govern the police officers in the

1 execution of search warrants in circumstances like this.
2 They need protection, Your Honor.

3 Thank you.

4 JUSTICE STEVENS: Thank you, Mr. Phillips.

5 The case is submitted.

6 (Whereupon, at 12:06 p.m., the case in the
7 above-entitled matter was submitted.)

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